Supreme Court, U.S.
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No. 99-49

IN THE

Supreme Court of the United States

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other Persons similarly situated,

Petitioners,

v.

WILLIAM WALDMAN, in his official capacity as Commissioner of New Jersey Department of Human Services; LEONARD FISHMAN, in his official capacity as Commissioner of New Jersey Department of Health and Senior Services; VELVET MILLER, in her official capacity as Director of Division of Medical Assistance and Health Services; MARK SCHIFFER, in his official capacity as Director of Passaic County Board of Social Services;
NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE RESPONDENTS IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether New Jersey's use of an "income-first" methodology in determining whether a community spouse is entitled to set aside a larger share of resources than the standard maximum resource allowance set by statute is a permissible interpretation of 42 U.S.C. § 1396r-5(e)(2)(C).

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Respondents, various New Jersey state officials sued in their official capacities (collectively referred to herein as

"the State Respondents"), hereby submit this brief in opposition to the petition for certiorari filed by Thomas J. and Carolyne Cleary ("Petitioners").[1]

STATEMENT OF THE CASE

The question presented involves the reasonableness of the State's interpretation of subsection (e)(2)(C) of the spousal impoverishment provisions of the Medicaid program, section 1924 of the Social Security Act, enacted in Section 303 of the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), Pub. L. No. 100-360, 102 Stat. 683. The spousal impoverishment provisions are codified at 42 U.S.C. § 1396r-5 ("the statute").

In enacting the spousal impoverishment provisions, Congress sought to address two perceived flaws in the then-existing Medicaid eligibility rules as they applied to elderly married couples. The first and most significant problem was that the prior eligibility rules required a married couple to deplete, or "spend-down," nearly all of their joint resources before a spouse requiring institutional care (the "institutionalized spouse") could qualify for Medicaid. This was compounded by the further requirement that the institutionalized spouse, once eligible for Medicaid, apply

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[1] The suit was originally brought against William Waldman, in his official capacity as Commissioner of New Jersey Department of Human Services; Leonard Fishman, in his official capacity as Commissioner of New Jersey Department of Health and Senior Services; Velvet Miller, in her official capacity as Director of Division of Medical Assistance and Health Services; and Mark Schiffer, in his official capacity as Director of Passaic County Board of Social Services. Since then, Mr. Waldman, Mr. Fishman, and Ms. Miller have been succeeded in office by Michelle K. Guhl, Christine Grant, and Margaret A. Murray, respectively. Counsel for Respondents has notified the Clerk of this change pursuant to Rule 35 of the Rules of the Court.

most of the couple's monthly income to offset the cost of his care. Accordingly, the spouse remaining in the community (the "community spouse") was left with little or no income or resources on which to live once the institutionalized spouse qualified for Medicaid.

At the same time, however, the prior law left open a number of loopholes whereby a couple could shelter a great deal of resources in trusts or in the community spouse's name such that the institutionalized spouse could qualify for Medicaid at a higher wealth level than that contemplated by the Medicaid program, which was designed to provide assistance to the aged "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396 *et seq.* The spousal impoverishment provisions were thus designed "'to end th[e] pauperization [of the community spouse] by assuring that [she] has a sufficient—*but not excessive*—amount of income and resources available" on which to live once the institutionalized spouse becomes eligible for Medicaid. H.R. Rep. No. 100-105(II), 100th Cong., 2nd Sess. 65, *reprinted in* 1988 U.S.C.C.A.N. 857, 888 (emphasis added).

As enacted, the statute addresses these joint concerns by specifying certain minimum and maximum income and resource "allowances" that should be protected for the maintenance of the community spouse once the institutionalized spouse qualifies for Medicaid. As for resources, the statute provides for a "resource allowance" for the community spouse which cannot be included among those resources that need to be spent-down before the institutionalized spouse may qualify for Medicaid. The standard resource allowance is determined by each state, but can be no less than the statutory minimum — $12,000 (adjusted annually) or a greater amount set by the state — and no greater than the statutory maximum — the lesser of one-half of a couple's total joint countable resources or

$60,000 (adjusted annually) — unless a higher allowance is substituted by hearing or court order. 42 U.S.C. § 1396r-5(f)(2)(A).[2] To prevent the sheltering of additional resources, the statute provides that all of a couple's remaining countable resources in excess of this resource allowance be counted in determining the institutionalized spouse's eligibility for Medicaid. *See id.* § 1396r-5(c)(2).

As for income, the statute initially provides that income paid solely in the community spouse's name cannot be considered "available" to the institutionalized spouse to apply towards the cost of his care once he becomes eligible for Medicaid. *Id.* § 1396r-5(b). The statute also provides that a community spouse is entitled to a minimum monthly maintenance needs allowance ("minimum monthly need") once the institutionalized spouse becomes eligible for Medicaid. *Id.* § 1396r-5(d)(3). The minimum monthly need is an amount considerably above the poverty level, established by each state within certain maximum and minimum levels. *Id.* If the amount of monthly income available to the community spouse falls short of this minimum monthly need, the statute further provides that the institutionalized spouse can transfer his available monthly income to the community spouse in an amount necessary to make up that shortfall before applying any income towards the cost of his care. *Id.* § 1396r-5(d)(1)(B). The amount so

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[2] In 1996, for instance, the standard maximum resource allowance was $76,740. Thus, if a couple had $200,000 in countable joint resources at the time the spouse entered an institution, the community spouse would be entitled to a resource allowance of $76,740, unless a larger resource allowance were set by hearing or court order. If a couple had $100,000 in countable joint resources, the community spouse would be entitled to a resource allowance of $50,000 (one-half of the joint resources), unless a larger allowance were set by hearing or court order.

transferred is called the "community spouse monthly income allowance," and is defined as the amount by which the minimum monthly need exceeds "the amount of income otherwise available to the community spouse." *Id.* § 1396r-5(d)(2).

Subsection (e) of the statute, the subsection at issue here, provides for a fair hearing mechanism in which couples may seek adjustments to the standard allowances provided for in the statute, including, among others, the standard resource allowance, minimum monthly need allowance, and community spouse monthly income allowance described above. *Id.* § 1396r-5(e)(2). In particular, subsection (e)(2)(C) provides:

> If either spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly needs allowance.

Id. § 1396r-5(e)(2)(C).

The states have interpreted this subsection in various ways. Some states apply a "resource-first" approach. In "resource-first" states, if the community spouse demonstrates that monthly income in her own name, including monthly earnings from the standard resource allowance, will not be enough to meet the minimum monthly needs amount once the institutionalized spouse becomes eligible for Medicaid, the hearing officer will substitute for the standard maximum resource allowance that amount of resources needed to generate the shortfall, without regard to any income that the institutionalized spouse may transfer to the community

spouse under the statute. For community spouses who do not receive much income in their own names, this can mean that literally hundreds of thousands of dollars of a couple's resources are protected from being spent-down in the process of rendering the institutionalized spouse eligible for Medicaid.[3]

Other states, like New Jersey, follow an "income-first" approach in determining whether to substitute a resource allowance that is greater than the standard maximum amount provided for in the statute. In "income-first" states, the hearing officer first looks to see whether monthly income that the statute expressly permits the institutionalized spouse to transfer to the community spouse to meet her minimum monthly need will be sufficient to make up any shortfall between the community spouse's own monthly income and the minimum monthly need amount. Only if the income transferable from the institutionalized spouse will not be sufficient to make up the shortfall do these states permit the substitution of a higher resource allowance.

It is the permissibility of the income-first approach that is the sole issue on which Petitioners seek review. In a well-reasoned opinion, the district court below rejected Petitioners' contention that the plain meaning of the statute

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[3] For example, in the case of the Clearys, Mrs. Cleary receives a social security check in her own name in the amount of $516.50 per month. The standard maximum resource allowance applicable in her case is $76,740, which earns approximately $311.74 in monthly interest at a 5% rate of return. Her minimum monthly need allowance, as calculated under the State rules, is $1,524.40. Under the resource-first approach, she would be able to make up the $696.28 monthly shortfall by increasing her resource allowance by an additional $167,040, producing a total resource allowance of $243,780, over three times the maximum standard amount. *See Cleary v. Waldman*, 959 F. Supp. 222, 227 (D.N.J. 1998), *aff'd*, 167 F.3d 801 (3rd Cir. 1999); Petition at 38a.

mandates a resource-first approach, and concluded that the statute was, at best for Petitioners, ambiguous on this question. The Third Circuit affirmed.

SUMMARY OF ARGUMENT

This Court declined to review this precise question only nine months ago, when the Sixth Circuit Court of Appeals reached the same result as the courts below, and there is no reason for further review now. Petitioners' arguments have been presented to and rejected by two federal Courts of Appeal and the highest courts of the states of New York and Massachusetts. All of these courts agree that subsection (e)(2)(C) is ambiguous and permits states to adopt either a resource-first or an income-first approach. This view is consistent with informal policy statements and memoranda issued by the U.S. Department of Health & Human Services ("HHS") and the Health Care Financing Administration ("HCFA"), the federal agencies assigned responsibility for administering the Medicaid statute.

Petitioners nevertheless contend that this Court should grant the writ because the divergent approaches taken by the states undermine Congress's goal of a "uniform spousal impoverishment" program across the states. There is no such goal in the Medicaid program generally, nor in the spousal impoverishment provisions in particular. Variety in state programs is inherent to the Medicaid program. Although the federal statutes impose certain mandatory guidelines, participating states are generally afforded broad discretion in implementing their programs consistent with those guidelines. Specifically, the spousal impoverishment provisions on their face allow for differences in the various allowances among the states. Moreover, the statute provides that adjustments to the maximum standard resource allowance can only be granted through a fair hearing process, an inherently discretionary mechanism. The fact that Congress structured the statute so as to define a standard

maximum resource allowance and provide for adjustments to that standard level only through a fair hearing process readily demonstrates that Congress contemplated that the States might implement such adjustments in different manners.

As the Third Circuit correctly concluded, had Congress desired the uniform result urged by Petitioners – that community spouses in all instances be entitled to a resource allowance in an amount sufficient to generate any shortfall between the community spouse's own income and the minimum monthly need allowance – it could simply have defined the standard resource allowance accordingly. The fact that it did not – and in fact ultimately rejected a version of the bill that did just that – demonstrates the lack of merit in Petitioners' argument that the plain meaning of the statute mandates a resource-first approach.

REASONS FOR DENYING THE WRIT

The question presented does not satisfy this Court's traditional criteria for certiorari. This Court denied certiorari to review this precise question presented in a case out of the Sixth Circuit only nine months ago in *Chambers v. Ohio Department of Human Services*, 119 S. Ct. 408, 142 L. Ed. 2d 331 (Nov. 2, 1998). Nothing has occurred since that time that argues in favor of granting the writ now. The only case to address the question since is the Third Circuit decision at issue, in which the court, consistent with the Sixth Circuit in *Chambers*, held that the income-first approach used by New Jersey is a permissible interpretation of the statute.

Every United States Court of Appeal and every state court of last resort to rule on the issue has reached this same result. *See Cleary v. Waldman*, 167 F.3d 801 (3rd Cir. 1999); *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408, 142 L. Ed. 2d 331 (1998); *Thomas v. Commissioner of the Division of Medical Assistance*, 682 N.E.2d 874 (Mass. 1997); *Golf v. New York*

Dept. of Social Servs., 91 N.Y.2d 656 (1998). Moreover, the result reached by these courts is consistent with the interpretation of subsection (e)(2)(C) espoused by HHS and HCFA, the federal agencies charged with administering the Medicaid program at the federal level. These agencies have stated in informal policy statements and letters that participating states have the option of using either the income-first or resource-first approach. *See* HCFA Memorandum from Medicaid Bureau Director Sally Richardson (March 1994) (stating that states may elect either approach); HCFA Letter to Pennsylvania Department of Public Welfare (April 1994) (same); Chicago Regional State Letter 22-94 (July 1994) (same); Letter from Donna E. Shalala to George V. Voinovich (March 1996) (same).[4]

The only judicial decisions not reversed on appeal that hold that subsection (e)(2)(C) mandates a resource-first methodology are from two Ohio intermediate appellate courts, both decided prior to the Sixth Circuit's decision in *Chambers*. *See Kimnach v. Ohio Dep't of Human Servs.*, 645 N.E.2d 825 (Ohio App. 10th Dist. 1994), *appeal denied*, 644 N.E.2d 409 (Ohio 1995); *Gruber v. Ohio Dep't of Human Servs.*, 647 N.E.2d 861 (Ohio App. 5th Dist.), *appeal denied*, 644 N.E.2d 409 (Ohio 1995). The only other purportedly "inconsistent" decisions cited by Petitioners are a federal district court approval of a settlement in which Pennsylvania agreed to employ the resource-first method, *see Hurly v. Houston*, No. 93-3666 (E.D. Pa. July 1, 1996), a decision by the Office of Appeal for Florida's Department of Children

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[4] HCFA had taken the position in an earlier policy statement that states should adopt the income-first approach, *see* Chicago Regional State Letter, HCFA State Medicaid Manual, HCFA-Pub. 45, § 3262.3 (Dec. 1993), but later clarified that the prior policy was not binding and that the states could choose between either approach.

and Families that it could not consider the issue because prior Office of Appeal precedent established use of the resource-first method in Florida, *see McGraw v. Agency for Health Care Administration*, Appeal No. 98F-3528, and several state and federal court decisions that have subsequently been reversed on appeal.[5] These decisions do not raise a conflict of such significance as to merit review by this Court.

Notwithstanding the decisive weight of judicial and federal administrative authority against their position, Petitioners contend that this Court should grant the writ because of the importance of the question presented to the administration of the statute. The divergent application of subsection (e)(2)(C) among the states, Petitioners argue, undermines Congress's purported goal of establishing a "uniform spousal protection program."

As this Court's past experience with the Medicaid Act can surely attest, *see*, *e.g.*, *Atkins v. Rivera*, 477 U.S. 154, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986); *Schweiker v. Hogan*, 457 U.S. 569, 102 S. Ct. 2597, 73 L. Ed. 2d 227 (1982), variance among individual state Medicaid programs is inherent to the Medicaid system. No two state Medicaid programs are alike. While the Act imposes certain mandatory minimum and maximum benefits, the vast

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[5] *See State of Ohio ex. rel. Robert Chambers et al. v. Ohio Dep't of Human Servs.*, No. C-2-94-1094 (S.D. Ohio Feb. 16, 1996) (granting partial summary judgment for plaintiffs), *rev'd*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408, 142 L. Ed. 2d 331 (1998); *Comis v. Bullen*, No. 94-4513 (Mass. Sup. Ct. Jan. 31, 1996) (granting partial summary judgment for plaintiffs), *rev'd, sub. nom. Thomas v. Commissioner of the Division of Medical Assistance*, 682 N.E.2d 874 (Mass. 1997); *Golf v. New York Dept. of Social Servs.*, 634 N.Y.S. 2d 581 (A.D. 4th Dept. 1995) (reversing lower court ruling that income-first methodology was not permissible), *rev'd*, 91 N.Y.2d 656 (1998).

majority of benefits provided under the Act are optional, and the States are afforded a great deal of discretion in the manner in which their individual programs are implemented.

The spousal impoverishment provisions are no exception. Even on the face of the statute, there is no absolute parity of treatment of community spouses among the participating states. For instance, although the statute mandates certain minimum and maximum amounts for the minimum monthly needs allowance, the states may choose any amount in between. *See* 42 U.S.C. § 1396r-5(d)(3). Thus, a community spouse in one state may be entitled to a minimum monthly need allowance that is significantly less than the amount a community spouse is entitled to in another state.[6] Likewise, each state has the option of choosing a minimum resource allowance that is greater than the standard minimum set forth in the statute. *See id.* § 1396r-5(f)(2)(A)(i).

While Congress may have intended that community spouses in every state have a specified amount of monthly income available to them, as established by each state within the maximum and minimum range, once the institutionalized spouse becomes eligible for Medicaid, both the "resource-first" and the "income-first" approaches attain this goal. The only difference between the approaches is whether the hearing officer may first consider income transferable from the institutionalized spouse in determining whether the community spouse's minimum monthly needs allowance will be met. Either approach makes monthly income available to the community spouse to meet her minimum monthly need

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[6] States also have some discretion under the statute in determining whether the community spouse is entitled to certain "excess shelter" costs in addition to the maximum minimum monthly need allowance. *See* 42 U.S.C. § 1396r-5(d)(4).

once the institutionalized spouse becomes eligible for Medicaid. The statute does not envision any greater uniformity in attaining this end.

Petitioners suggest that where Congress intended the States to exercise discretion it did so explicitly. Even accepting this premise solely for purpose of argument, what better way to indicate discretion than to provide for a fair hearing mechanism? The fact that Congress structured the statute so as to define a standard maximum resource allowance and to provide for adjustments to that standard level only through a fair hearing process, an inherently discretionary mechanism, undermines Petitioners' suggestion that Congress intended the States to implement the adjustments provided for in subsection (e)(2)(C) in a uniform manner across the states.

The "uniform" rule urged by Petitioners would, in fact, render subsection (e)(2)(C) superfluous. Had Congress intended the "plain meaning" urged by Petitioners, it could have defined the standard resource allowance as that amount needed to bring the community spouse's own monthly income up to the minimum monthly need amount. As discussed in the Third Circuit Court's opinion below, that is precisely what the Senate version of the bill proposed. That version was ultimately rejected, however, in favor of the law ultimately adopted. *See Cleary*, 167 F.3d at 811; Petition at 22a.

Petitioners spend a great deal of their brief discussing the financial plight of community spouses in "income-first" states, who must live on the standard maximum resource allowance provided for in the statute and a monthly income allowance consisting in part of income transferred from the institutionalized spouse. But the standard maximum resource allowance, together with the minimum monthly need allowance, was determined by Congress to be sufficient to protect the community spouse from impoverishment. To the

extent that Petitioners' real concern is that the standard allowances provided for in the statute are too low to protect community spouses from impoverishment, the appropriate place to seek relief is Congress, not this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

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